In the Court of Appeal of Alberta

Citation: Alberta Union of Provincial Employees v Alberta, 2019 ABCA 320

Date: 20190906
Docket: 1903-0194-AC
Registry: Edmonton

Between:

Alberta Union of Provincial Employees,
Guy Smith, Susan Slade and Karen Weiers

Respondents
(Applicants)

- and -

Her Majesty the Queen In Right of Alberta

Appellant
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment of the Honourable Mr. Justice Watson and the Honourable Mr. Justice Slatter

Dissenting Memorandum of Judgment of the Honourable Madam Justice Paperny

Appeal from the Order by
The Honourable Mr. Justice E.F. Macklin
Dated the 30th day of July, 2019
Filed the 2nd day of August, 2019
(2019 ABQB 577, Docket: 1903 13095)

Memorandum of Judgment

The Majority:

[1] This is an appeal of an interim injunction granted by the trial court: ***Alberta Union of Provincial Employees v Alberta***, 2019 ABQB 577. That injunction stayed the implementation by the government of Bill 9, the *Public Sector Wage Arbitration Deferral Act*, SA 2019, c. P-41.7.

Facts

[2] The background is that the government and the respondent union entered into a number of three year collective agreements. Those agreements implemented a two year wage freeze, with an option in the third year to reopen negotiations about wages. The agreements provided that if the "wage-reopener" negotiations were not successful, the issue would be sent to binding arbitration, with any wage adjustment to be retroactive to April 1, 2019. Some of the agreements specifically provided that the arbitration would occur no later than June 30, 2019.

[3] The wage-reopener negotiations were not successful, and the respondent union triggered the arbitration process. However, a provincial election was held on April 16, 2019, resulting in a change of government. In fulfilment of an election promise, the new government appointed a Blue Ribbon Panel to report on Alberta's finances. The new government did not think it would be adequately prepared to enter into the arbitration process until that report was received, which would be outside the deadline in the collective agreements. Consultation and discussions about an adjournment of the arbitration were unsuccessful, and the arbitrator ruled that she had no jurisdiction to delay the arbitration. The government therefore enacted Bill 9, the essential effect of which is to suspend the arbitration process until October 31, 2019. Several unions commenced actions for a declaration that Bill 9 is unconstitutional, and the respondent union also applied for an interim injunction preventing its implementation.

[4] The chambers judge applied the three part test for an interim injunction. He found that there was a genuine issue to be tried, namely whether Bill 9 was an unconstitutional infringement of the rights of the union members. He concluded that there was irreparable harm to the collective bargaining relationship, notwithstanding that any arbitration award could be made retroactive. The balance of convenience favoured the union. Even though the effect of an injunction would be to nullify the effects of Bill 9, it was more important for the court to protect valid agreements that were freely negotiated between the parties:

> 54. It is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations through legislation that may interfere with *Charter* rights. . . .

As a result, the chambers judge stayed the operation of Bill 9 until the respondents' claim could be determined at trial.

Standard of Review

[5] The decision to grant an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only for an error of law or principle, where there are palpable and overriding errors of fact, or where the exercise of the discretion is unreasonable: ***R. v Canadian Broadcasting Corp***, 2018 SCC 5 at para. 27, [2018] 1 SCR 196. However, while deference is due, trial judges are not immune from review, and appellate courts must intervene when reviewable errors are disclosed: ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at paras. 73, 75, [2005] 1 SCR 401; ***R. v Regan***, 2002 SCC 12 at para. 118, [2002] 1 SCR 297.

Interim Injunctions Suspending Legislation

[6] The test for an interim injunction is well established. It was set out in ***RJR-MacDonald Inc v Canada (Attorney General),*** [1994] 1 SCR 311 at p. 334:

> . . . First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

There can often be overlap in the factors to be considered under this tripartite test.

[7] In a case like this, involving an injunction to prevent the implementation of legislation, there are other collateral principles in play:

(a) There is a strong presumption that legislation is constitutional: ***Harper v Canada (Attorney General)***, 2000 SCC 57 at para. 9, [2000] 2 SCR 764; ***Toronto (City) v Ontario (Attorney General)***, 2018 ONCA 761 at para. 21, 142 OR (3d) 481.

(b) There is a strong presumption that the legislation is in the public interest. At this stage ". . . the motions judge must proceed on the assumption that the law . . . is directed to the public good and serves a valid public purpose": ***Harper v Canada*** at para. 9, and

(c) When they effectively amount to final relief, interim injunctions should be granted cautiously: ***Harper v Canada*** at para. 7. An application for an interim injunction should not, in effect, amount to summary judgment.

[8] The serious issue to be tried was identified as the constitutionality of Bill 9. While the interim injunction in this case is technically only temporary relief pending a trial of the action, given the issues involved the interim injunction effectively resolved the claim. Bill 9 only deferred the commencement of the arbitration until October 31. It was, at the time the injunction was granted, highly unlikely that a trial could be held between then and October 31. In a practical sense the specific issue respecting the constitutionality of Bill 9 would become moot while the "interim" injunction was in place, and Bill 9 would have been nullified, at least for the collective agreements covered by the injunction. As discussed below, the chambers judge's conclusion at para. 25 that the injunction is not effectively a final determination is not supportable on this record. It is true that a final finding of a *Charter* breach would be essential to justify the other remedies sought by the statement of claim, but that is not the same thing as sweeping Bill 9 aside for its effective duration on an interim motion.

[9] These aspects of the interim injunction impact the first part of the tripartite test, because in practical terms the operational viability of Bill 9 is going to be determined depending on whether the interim injunction is maintained. As noted, interim injunctions should rarely be granted when they amount to final relief.

[10] The chambers judge went far beyond considering whether there is a serious issue to be tried. He observed at para. 43 that the public interest reflected in the legislation must be balanced by "reasonable limits imposed, also in the public interest". At para. 46 he concluded: "It is necessary for the Court to consider, however, whether the public interest may be better served by an Interim Injunction staying the operation of Bill 9." He then concluded at para 54: "It is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations through legislation that may interfere with Charter rights . . ." (emphasis added).

[11] That is not the test to be met at trial, nor was it the test to be met at the interim injunction stage. The interim injunction essentially summarily determined the claim, using the wrong test. The underlying issue is whether: a) Bill 9 involves a breach of the *Charter*, and if so b) whether it is demonstrably justified in a free and democratic society. The issue was not, as the trial judge reasoned, whether Bill 9 was in the "long-term public interest". As stated in ***RJR-MacDonald*** at pp. 348-9:

> . . . When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of

> the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

No part of the tripartite test gives the chambers judge a mandate to assess whether validly enacted legislation is in the public interest.

[12] The statement of claim raises a number of arguable, serious issues respecting the constitutionality of Bill 9, but the analysis of the chambers judge became focused, in the abstract, on a balancing of the public interest. The chambers judge essentially decided that Bill 9 was unconstitutional legislation that was not demonstrably justified in a free and democratic society. The government, however, was not in a position in this injunction context to fully defend the litigation, or to put forward a s. 1 justification, something that would obviously require a trial. As discussed below, the analysis also failed to properly apply the presumption that legislation is constitutionally valid, and that stays of legislation based on allegations of unconstitutionality should be sparingly granted.

[13] The focus on balancing the public interest was inappropriate, but it was also flawed. The chambers judge relied at para. 52 on the decision in ***Bhasin v Hrynew***, 2014 SCC 71, [2014] 3 SCR 494 for the proposition that it is in the "public interest" that contracts be honoured. ***Bhasin***, however, is a case about the relationship between private contracting parties. It is a private law case, not a case about the "public interest", and it does not establish any constitutional rights. The present appeal is about the constitutional limits on a legislative body exercising its rights to legislate. It is not about the government's rights and obligations as a contracting party.

[14] Although collective agreements are rarely disturbed by legislation in Canada, the government has the right to legislate with respect to labour relations, within constitutional limits. At the initial stage, it is up to the Legislature (not the courts) to decide if the public policy advantages of legislation like Bill 9 outweigh the disadvantages, and such legislation is entitled to the presumption of constitutional validity. The test at trial will be whether there is a breach of s. 2(d) of the *Charter*, and if so whether it is demonstrably justified in a free and democratic society. That there "may" be a *Charter* breach indicates that there is a genuine issue for trial, but a summary conclusion about the overall public interest did not justify an interim injunction, nor would it be the ultimate test at trial. The courts are ". . . not to make value judgments on what they regard as the proper policy choice": ***Vriend v Alberta***, [1998] 1 SCR 493 at para. 136.

[15] A principal point of disagreement turned on the concept of "clearest of cases" in the three aspects of the test for injunctions. Each party tended to link the "clearest of cases" to different ideas. The respondents persuaded the chambers judge that the first aspect of the injunction test required merely an arguable case that the legislation in question infringed the freedom of association of its members under s 2(d) of the *Charter*. In other words, the "arguable case" element of the test accepted by the chambers judge was found to be met at the low

threshold that has been found to exist in various private law contexts -- namely an argument that has an air of reality on the available evidence. The appellant for its part contended that, inasmuch as this was a situation of regularly enacted legislation, the arguable case had to clearly show a significant adverse effect upon the *Charter* freedom in question, citing ***Harper v Canada*** at para. 9.

[16] This is not an issue respecting burden of proof, but rather one involving the presumption of legality, a presumption that does not exist in relation to a private law claim. Before an injunction will issue to restrain the implementation of validly enacted legislation, there must be some precision with respect to the *Charter* claim. This informs the "clearest of cases" analysis. In other words, a court is not to stop legislation in its tracks merely because the court can discern from eloquent arguments of counsel that there might be something constitutionally objectionable about the law. That said, where the applicant can show a clearly identifiable basis for proving a clearly identified *Charter* breach, and the effects of the breach, the question of whether those negative effects involve irreparable harm is considered at the second step of the injunction analysis.

[17] Not all legislation receives universal public support, and some legislation is subsequently found to be unconstitutional, but in the short term the elected legislators must be allowed to legislate except in the clearest of cases. In this situation, the government has not purported to take away the right to binding arbitration, or a right to a wage increase in the third year of the collective agreements, but has merely deferred the arbitration for a few months. It is not sufficiently clear that Bill 9 is unconstitutional so as to justify an injunction on its implementation.

[18] As the chambers judge found, the respondent union would not suffer any direct irreparable harm. Bill 9 merely delayed the arbitration for four months; having to wait four months is not irreparable harm. The collective agreements state that the ultimate arbitration award will be retroactive until April 1, 2019. Any delays in payment could be dealt with by the arbitrator, possibly through an award of interest. Pre-trial relief for what is essentially a money claim is exceptional: ***Aetna Financial Services Ltd v Feigelman***, [1985] 1 SCR 2 at p. 10.

[19] The chambers judge suggested at para. 36 that the "only concession by HMQ and the only benefit to AUPE" was the agreement to arbitrate within certain timelines, and that "AUPE will have fully lost that agreed-upon concession". This finding is not supported by the record, and reflects palpable and overriding error. The affidavit of Dale Perry confirms that the respondent union achieved benefits from other portions of the negotiations, and agreed to the entire package (including the wage reopener) in order to lock-in the advantages that had been obtained. The respondent union deferred, but never gave up the chance to argue for a wage increase in the third year of the collective agreements. In fact, the respondent union enhanced its position by replacing an opportunity to bargain for a wage increase in the third year, with a right to a binding interest arbitration on that subject.

[20] The respondent union asserts that it gave up its right to strike in return for the timing of the arbitration of a wage increase in the third year. One could equally argue that the appellant gave up the right to lock out the employees in order to maintain existing wage levels, and surrendered the final decision on third year wages to an independent arbitrator. The Master Agreement between the parties is over 100 pages long, and includes numerous covenants. It is unrealistic to think that "but for" the time limitation on the commencement of the third year wage increase arbitration, an agreement would not have been reached, and a strike would have resulted.

[21] Bill 9 does not disturb the right to arbitration, the prospect of a wage increase in the third year, or its retroactivity. As noted, the only "harm" arising from Bill 9 was a four month delay in the commencement of the arbitration process. The chambers judge's conclusion at para. 48 that the "specified timelines" for the commencement of the arbitration process were the only benefit AUPE gained under the collective agreements is unreasonable on this record.

[22] Even though the chambers judge had rejected the respondents' opinion evidence on the subject (reasons at para. 33), he found that irreparable harm arose from damage to the collective bargaining relationship, but that second-guesses the legislative policy choice behind Bill 9. Collective bargaining always is, and always will be adversarial. It was unrealistic to conclude that delaying the commencement of the arbitration for a few months is going to bring about any fundamental change to the overall collective bargaining relationship. The government and the public sector unions are going to disagree about some things all of the time, and different other things from time to time. As noted above, the initial stage, it is up to the Legislature to decide if the public policy advantages of legislation like Bill 9 outweigh the disadvantages arising from disruption of the collective bargaining regime, and the legislation is entitled to a presumption of constitutional validity. The essential issue for trial is whether Bill 9 is within the constitutional limits, either intrinsically or via s. 1.

[23] As noted, the government always retains the right to legislate with respect to labour relations, within constitutional limits: ***Ontario (Attorney General) v Fraser***, 2011 SCC 20 at para. 47, [2011] 2 SCR 3. The respondents argue that irreparable harm arises when "freely negotiated terms [are] unilaterally nullified", and that Bill 9 would make their negotiators reluctant to negotiate and compromise in future. The prospect of legislative variation of collective agreements, however, is an inherent part of collective bargaining; any resulting "damage" to the collective bargaining relationship is largely inherent in that prospect. The issue is magnified with public sector collective bargaining, where the government is both employer and legislator. The exercise on a particular occasion of the legislative mandate to override collective agreements is unlikely to have a material impact on the overall, long-term nature of public sector collective bargaining. The granting or denial of the present interim injunction (and the existence or non-existence of Bill 9) will not have any effect on whether that prospect of "unilateral nullification" exists in the background of collective bargaining. The finding of irreparable harm based on the effect of Bill 9 on the collective bargaining relationship is

essentially a finding that legislative interference with a collective agreement is: a) never constitutional, or b) that it is bad public policy for the Legislature to ever exercise that jurisdiction. The former is the issue for trial; the latter is not an issue for the courts.

[24] There is obviously an important issue here. The law on the extent to which collective bargaining, and collective agreements, are protected by the *Charter* is still being developed: ***Canada (Attorney General) v Canadian Union of Public Employees, Local 675***, 2016 QCCA 163 at para. 31. The government likely takes the view that certain changes to collectively bargained rights are allowed, or can be demonstrably justified in a free and democratic society. The unions would likely want to establish a rule that no legislated variation of a collective agreement is ever constitutional. Those are issues for a trial, at which both parties can present evidence and argument. It is true that in this particular case the issue of the constitutionality of Bill 9 may be moot by the time any trial is held, but this may well be one of those cases where the courts should hear and decide a moot issue. The issue is important, but it should not, in effect, have been summarily determined by the issuance of an interim injunction.

[25] The final factor is the balance of convenience. At the time that the collective agreements were negotiated, the parties would have known that a provincial election would occur when it did. The nature of the democratic process is that governments change from time to time, and new governments need some time to get up and running. New governments should be entitled, within limits, to the presumption that legislation is constitutional. There is a presumption that enjoining validly enacted legislation will affect the public interest: ***RJR-MacDonald*** at p. 346. The respondents had the burden of showing that suspension of the legislation would serve an overriding public interest. Apart from a four month delay in the commencement of the arbitration, the alleged inconvenience to the respondents seems to amount to an inability to obtain a summary determination that the inroads on their collective agreements made by Bill 9 could never be proven to be constitutional.

[26] Furthermore, a denial of an interim injunction would not mean the respondents could not fully pursue the action which nourished the injunction motion in the first place. Ultimately what the chambers judge concluded amounted to a replacement of the determination of balance of convenience in light of the foregoing considerations, with a conclusion that the government should be held to the terms of its collective agreements because otherwise the public's confidence in government collective bargaining would be undermined. That was error.

[27] As noted, the recited purpose of Bill 9 was to give the new government more time to prepare for the arbitration, specifically by receipt of the Blue Ribbon Panel report. The chambers judge found at para. 51, in the context of the balance of convenience, that the government actually had all the information it needed. It was in fact fully prepared to arbitrate. Bill 9 was not needed after all. The conclusion that this line of reasoning justified suspending validly passed legislation is an error in principle, and also reflects a reviewable error.

Conclusion

[28] An interim injunction is discretionary equitable relief, and deference is owed to the chambers judge. The decision under appeal, however, rests on errors of principle, and is unreasonable. The factual and other findings with respect to irreparable harm and the balance of convenience reflect palpable and overriding error. The appeal is allowed, and the injunction set aside.

Appeal heard on August 29, 2019

Memorandum filed at Edmonton, Alberta
this 6th day of September, 2019

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Court of Appeal of Alberta

Watson J.A.

Slatter J.A.

Paperny J.A. (dissenting):

Introduction

[29] The government appeals an interlocutory order that enjoins the operation of a piece of legislation. The respondent Alberta Union of Provincial Employees (AUPE), as bargaining agent, is party to a number of collective agreements, with the government as employer, that contain wage-reopener provisions. The government recently passed Bill 9, *The Public Sector Wage Arbitration Deferral Act*, SA 2019 c P-41.7, that suspends an agreed-upon interest arbitration process that had been scheduled under the terms of those provisions. AUPE has challenged the constitutionality of Bill 9, which it says breaches s 2(d) of the *Charter*, and was granted an interlocutory injunction pending trial of that challenge.

Background

[30] When AUPE began its most recent round of collective bargaining with the government, it sought wage raises in each year. The government's position was that there would be no raises whatsoever in the first two years, but in the third year there would be a possibility of a wage reopener. The subsequent negotiations and mediations did not move the parties. Eventually, AUPE acceded to the government's position and the parties agreed that arbitrations on wages would occur by a specific date. In reaching that agreement, AUPE gave up its right to strike.

[31] On May 17, 2019, the newly elected government appointed an independent panel to prepare a report on Alberta's economic situation, to be provided by August 15, 2019. The government asked AUPE to delay the agree-upon arbitration until after delivery of the report. AUPE refused. The government then applied to the Chair of the arbitration panel for an adjournment of the arbitration. The Chair concluded she had no jurisdiction to delay the arbitration provided for in the collective agreement, and scheduled dates in June and August for the arbitration to proceed.

[32] On June 13, 2019, the government introduced Bill 9 in order to suspend the bargained-for arbitration process. Bill 9 came into force on June 28, 2019.

[33] On June 24, 2019, AUPE commenced the within action seeking, among other things, a declaration that Bill 9, or portions thereof, infringes s 2(d) of the *Charter* and is not saved by s. 1.

[34] AUPE then applied for an order staying the operation of Bill 9 as against AUPE. The chambers judge granted the interim injunction on July 30, 2019, with the result that the interest arbitrations agreed upon in the collective agreements, and that were then in progress, could continue.

[35] The government appeals the granting of the interim injunction. This appeal raises the question of the correct test for granting an interim injunction of apparently validly enacted legislation in the face of an alleged constitutional infringement, and the level of deference to be given to the findings of the chambers judge when applying that test.

Decision to grant the interlocutory injunction

[36] In granting the interlocutory injunction, the chambers judge applied the well known tri-partite test articulated in *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

[37] At the outset of his reasons, the chambers judge noted that a legislature, as a democratically elected body, is generally entitled to enact laws as it sees fit in a manner it believes to be in the public interest.

[38] He also concluded, based on the record before him, that there was a serious issue to be tried, namely whether Bill 9 interferes with AUPE's section 2(d) right to freedom of association. In concluding that the challenge to the constitutionality of Bill 9 raises a serious issue, the chambers judge rejected the argument that the delay imposed by the legislation was temporary or insignificant. He concluded that by effectively rendering aspects of the collective agreement inoperative, Bill 9 called into question the value of associating for the purposes of collective bargaining and entering into a collective agreement, as discussed in *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 per Donald JA (in dissent, affirmed and adopted by the Supreme Court of Canada on appeal, 2016 SCC 49, [2016] 2 SCR 407). He specifically noted the following statement of Donald JA at para 285:

> The act of associating for the purpose of collective bargaining can ... be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory.

[39] On the issue of irreparable harm, the chambers judge concluded that, while the length of the delay or any possible financial loss would not result in irreparable harm, the effect of Bill 9 "goes deeper than mere delay or short-term monetary loss". He discussed the significance of the wage reopener to the collective bargaining process and to the AUPE and noted that the agreed upon third year wage reopener (with its fixed dates) was the only concession AUPE received. In reaching that agreement, AUPE relinquished two years of wage increases and the right to strike. The chambers judge concluded that, if Bill 9 is found to be unconstitutional, AUPE will have fully lost that agreed upon concession by the government, and AUPE's right to have the arbitration proceed within the specified times will not be recoverable. In addition, he found a likelihood of irreparable harm arises from the damage to the relationship between the parties. He concluded that irreparable harm to future negotiations could lead to a refusal to negotiate and compromise, and upset the bargaining relationship between the parties, "only one of whom can use its power to amend an 'agreement'".

[40] On the issue of balance of convenience, the chambers judge noted at the outset the comments of the Supreme Court of Canada in *Harper v Canada (Attorney General)*, 2000 SCC 57, [2000] 2 SCR 764 that, when assessing balance of convenience, a motions judge must assume that the impugned legislation is directed towards the public good and serves a public purpose. He went on to state that the court must also consider whether denying the injunction may deprive the applicants of their constitutional rights because of the time involved in getting a matter to trial. Having considered and cited the statements in *Harper*, the chambers judge nevertheless concluded that there was a competing and more significant public interest at stake here; namely that parties to otherwise valid, freely negotiated agreements honour their obligations. He found it is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations where such legislation has the effect of interfering with *Charter* rights. He weighed the public's interest in the operation of validly enacted legislation against the public interest in protecting collective bargaining from potential breaches of the *Charter*. In his assessment, the balance of convenience in this case favoured the latter, and he granted the injunction.

[41] The government appeals. It submits that the chambers judge's conclusion on irreparable harm is unsustainable as it was made in an evidentiary vacuum. The government also says that chambers judge's weighing of the balance of convenience is contrary to established legal principles, including the presumption that legislation is enacted in the public interest. The government argues that the chambers judge erred in doubting the legislation served a public interest or was effective for such a purpose, in failing to give the presumption of public interest sufficient weight, and in finding there is a counter vailing, and more weighty, public interest at play.

Standard of review

[42] All parties recognize that an interim injunction is a discretionary order and that the standard of review on appeal is deferential. An appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge has committed a legal error or a serious misapprehension of the evidence, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge . . . could have reached it": *R v Canadian Broadcasting Corp,* 2018 SCC 5, [2018] 1 SCR 196 at para 27.

Analysis

[43] Courts of first instance should be cautious in granting interlocutory injunctive relief generally, but particularly so in the face of apparently validly enacted legislation. The challenge for trial judges faced with an application to enjoin the operation of legislation that may infringe constitutional rights is well recognized and has been the subject of considerable judicial discussion. Those challenges were ably identified and addressed by Beetz J in *Manitoba v Metropolitan Stores (MTS)* Ltd, [1987] 1 SCR 110, and in the subsequent decision in *RJR-*

MacDonald. The test is the same for all interlocutory injunctions, and it is the applicable test here.

[44] It is well established that courts have jurisdiction to grant the relief requested by the applicants, even if the result would be a suspension of the legislation (although, as AUPE points out, the relief requested in this case amounts to an exemption from the legislation, not a complete suspension of its operation). As was noted in *RJR-MacDonald* at p 331, the suspension power must be exercised sparingly, but that is achieved by applying the *Metropolitan Stores* criteria strictly and not by a restrictive interpretation of the courts' jurisdiction.

[45] Whether to grant an interlocutory injunction in circumstances such as those now before the court involves a balancing process. On the one hand, the court must be cautious of rulings that deprive legislation enacted by elected representatives of its effect. On the other hand, to insist on legislation being enforced may to be to condone the continuing violation of *Charter* rights by legislation that may prove to be unconstitutional: *RJR-MacDonald* at pp 333-4.

[46] The tri-partite test requires a chambers judge to consider the following:

1 A preliminary assessment of the merits of the case to ensure there is a serious question to be tried;

2 Whether the applicant would suffer irreparable harm if the injunction were not granted;

3 Where the balance of convenience lies – which of the parties would suffer greater harm from the granting or refusal of the injunction. The public interest is a relevant consideration where the relief sought involves the operation of legislation.

[47] The first criterion requires the court to undertake a preliminary assessment of the merits of the claim. The threshold, adopted from *American Cyanamid*, is a low one: whether there is a serious question to be tried.

[48] The court in *RJR-MacDonald* specifically rejected the argument that a stricter standard should apply where an injunction would have the effect of suspending legislation, noting the importance of the interests which are alleged to have been adversely affected when a *Charter* violation is alleged: *RJR-MacDonald* at p 337. The court agreed with the statement of Beetz J in *Metropolitan Stores* at p 128 that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where ... the public interest is taken into consideration in the balance of convenience". Beetz J went on to state that it would be too high a test to say that it is only in exceptional and rare circumstances that the courts will grant interlocutory relief, particularly in exemption cases: *Metropolitan Stores* at p 147. Indeed, a more stringent standard would be incompatible with the court's role under the *Charter*.

[49] The authorities recognize two exceptions to the limited inquiry into the merits. A more rigorous inquiry into the merits may be appropriate where the granting of the injunction amounts to a final determination of the action, or where the constitutional question "presents itself as a simple question of law alone": *RJR MacDonald* at pp 338-339. The parties did not argue that either of these exceptions applies here, and, in my view, neither is applicable. In particular, the injunction granted does not amount to a final determination of the action. The issue of the constitutionality of the government's action in passing Bill 9 remains unresolved.

[50] At one point in oral argument, it was argued a higher threshold might apply to the assessment of the merits of this case, on the basis of a statement in *Harper* to the effect that, "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed": *Harper* at para 9. I do not read this statement as implying a need for a higher threshold test on the merits. Such a reading would be incompatible with the statements of the Supreme Court in both *RJR-MacDonald* and *Metropolitan Stores*.

[51] The Supreme Court has been clear that the public interest in the enforceability of validly enacted legislation is to be factored into the weighing of the balance of convenience: *Metropolitan Stores* at p 135; *RJR-MacDonald* at p 343. *Harper* reiterated that point at para 9. The court in *Harper* also emphasized that only when the interests that would be protected by the granting of the injunction will outweigh the public interest in the continued operation of the legislation should the injunction should be granted. This is a balance of convenience assessment, and does not imply a stricter standard at the first stage of the test. The "serious question to be tried" threshold is applicable here.

[52] The second aspect of the *RJR-MacDonald* test consists in deciding whether the applicant "would, unless the injunction is granted, suffer irreparable harm". "Irreparable" refers to the nature of the harm rather than its magnitude. Only harm to the applicant is relevant; any alleged harm to the respondent and to the public interest should be considered at the third part of the analysis: *RJR MacDonald* at p 341.

[53] The third criterion is a weighing of the balance of convenience. This assessment has been described as "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *Metropolitan Stores* at p 129.

[54] The factors to be balanced will vary in each case. There are, however, well-established principles that apply in constitutional cases where an applicant seeks to enjoin the operation of legislation. First, as has been noted, all constitutional cases will include a consideration of the public interest in the balance of convenience: *Metropolitan Stores* at p 149; *RJR MacDonald* at p 343.

[55] A second and related principle is that it is generally presumed that legislation will produce a public good: *Harper v Canada (Attorney General)*, [2000] 2 SCR 764 at para 9; see

also *RJR-MacDonald* at pp 348-9 where it was noted that "When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so". I do not agree that *Harper* stands for the proposition that there is also a presumption of constitutional validity. If what is meant by that term is that a legislative provision that has been challenged as unconstitutional must be presumed to be consistent with the *Charter*, that proposition was rejected by Beetz J in *Metropolitan Stores* as "not helpful" and "not compatible with the innovative and evolutive character" of the *Charter*: *Metropolitan Stores* at pp 121-124. *Harper* does not say otherwise; it posits only that when legislation is declared to promote the public interest, there is a presumption that it is in the public interest and has that effect. In my view, only one presumption is placed on the scales of balance of convenience, not two.

[56] The public interest in having legislation put into operation must be weighed in the balance of convenience, but it can be outweighed by countervailing interests of the public. The government does not have a monopoly on the public interest. As was noted in *RJR MacDonald* at p 343:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the 'public interest'. Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

[57] As will be seen, the chambers judge undertook just such a balancing exercise in this case.

The application of the test by the chambers judge

(i) Serious question to be tried

[58] Although its arguments can be variously characterized, the government essentially submits that the outcome of collective bargaining is not constitutionally protected. While as a general proposition this may be so, the case here is about the government refraining from interfering in an already agreed upon collective agreement and the process and timing of a resolution under that agreement.

[59] In order to establish a breach of s 2(d), an applicant has to show a substantial interference with the right to collectively bargain. The test for establishing a breach of association entails asking two questions: the importance of the matter affected to the process of collective bargaining, and the manner in which the measure impacts on the collective right to good faith

negotiation and consultation: *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 (*BC Health Services*) at para 93.

[60] As to the first inquiry, the Supreme Court has recognized that "laws that unilaterally nullify significant negotiated terms in existing collective agreements" may amount to a substantial interference with collective bargaining rights: *BC Health Services* at para 96. Here, the chambers judge found that the wage reopener clause was not procedural, but a significant right that had been freely bargained for by the parties in the context of setting wages in the collective agreement. The only thing the AUPE had obtained was a timely consideration of the wage-reopener. And that is the one thing that Bill 9 removed.

[61] The second inquiry considers the manner in which Bill 9 affects the right to good faith bargaining. Again, this matter was addressed by the chambers judge; he found that AUPE cannot "confidently negotiate detailed terms and conditions of a collective agreement" knowing that it could be unilaterally nullified by legislation. *BC Health Services* has established that such *ex post facto* legislative amendments to significant terms of already bargained collective agreements can meet the test for a breach of s 2(d). That observation is also supported by the more recent decision in *BC Teachers' Federation*, as cited by the chambers judge.

[62] As was noted by the Supreme Court in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at para 71:

> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).

[63] It is unnecessary to expand further on the matter of a serious issue to be tried. Although they characterize the issues somewhat differently, the parties agree that the threshold is met here. Whether Bill 9 breaches s. 2(d) rights in a manner that cannot be constitutionally justified is indeed serious.

(ii) Irreparable harm

[64] The government raises only one argument under this heading, namely that the conclusion arrived at by the chambers judge was without evidentiary foundation. It relies on

the chambers judge's rejection of certain opinion evidence as to what constitutes irreparable harm as being unnecessary or inadmissible because it is the role of the chambers judge to determine whether on the facts before him or her, the harm alleged is irreparable. This is a circular argument. In my view, there was an ample record to support the conclusions about the significance of the arbitration proceedings to the AUPE, and the effect of the unilateral suspension of those proceedings on AUPE's rights, on which to base a finding of irreparable harm. While other conclusions may have been available, it is not for this court to usurp the role of the chambers judge in the absence of reviewable error. No such error has been demonstrated.

[65] Moreover, much of the rejected evidence did not go to the harm actually found by the chambers judge. That evidence relates primarily to the potential damage to the relationship between AUPE and its membership. The chambers judge, on the other hand, found harm would result from the fact that AUPE, having made significant concessions in the collective bargaining process, would lose the only agreed-upon concession by the government; the agreement to arbitrate the issue of wages within specified timelines.

[66] The chambers judge further found that irreparable harm would arise from damage to future collective bargaining and the parties' ongoing relationship if the government's attempt to unilaterally change the terms of the collective agreement was found to be unconstitutional. The chambers judge was entitled to draw those conclusions based on the record before him and his own view of the situation. I note that these observations are not peculiar to this case, but are general observations about the effect of unconstitutional government action of the sort alleged here, and accord with comments made by the Supreme Court in *BC Health Services*, *Mounted Police Association of Ontario v Canada (Attorney General)*, and in the reasons of Donald JA (affirmed and adopted by the Supreme Court) in *BC Teachers' Federation*. "Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless": *BC Teachers' Federation* at para 286, citing *Ontario (Attorney General) v Fraser,* 2011 SCC 20, [2011] 2 SCR 3 at 46.

[67] The findings and conclusions of the chambers judge were available on the record before him, and he was entitled to make them. I see no basis on which to interfere with those conclusions.

(iii) Balance of Convenience

[68] This type of case generally falls to be decided on the balance of convenience, and this case is no exception.

[69] The thrust of the government's argument is that the chambers judge did not give sufficient, or any, weight to the caution articulated in *Harper* that it must be assumed that the legislation was enacted with the public interest in mind. The government submits that, although the chambers judge adverts to this principle, he failed to give it any weight, or worse, cast doubt on whether such a public interest actually exists in this case. In addition, the government

submits that the chambers judge did not find this to be a clear case, as required by *Harper*, because he failed to do the necessary analysis to determine whether the alleged breach was clear and unequivocal, sufficient to override presumptively valid legislation.

[70] First, as set out above, a careful reading of the jurisprudence leads me to conclude that the "clear case" criterion is to be applied only at this third stage, namely balance of convenience. Thus, it cannot go to the merits of the case; that test is already established in the jurisprudence and is clearly met here. I accept the submission of AUPE that it is intended to answer the following question: Having regard to all the circumstances, is this a clear case for granting the injunction? Put another way, the applicant must satisfy the court that the injunction ought to be granted in order to immediately protect the rights of those adversely affected.

[71] The government submits that the chambers judge improperly examined Bill 9 and found it wanting in terms of valid public purpose. I disagree and suggest this mischaracterizes the exercise undertaken by the chambers judge. He accepted the public purpose articulated in the Bill's preamble. His comments were directed to weighing those valid public interests against what he considered to be a worthy and competing public and private interest: the nullification of hard won concessions in a collective agreement and the impact on the prospect of future collective bargaining and labour peace, and the public's interest in seeing its government uphold its commitments in an already freely bargained collective agreement.

[72] In my view, it is part of the balance of convenience analysis to consider the effect of an injunction on the impugned government action. It is appropriate for a chambers judge to consider what will happen to those public interests (in this case, as expressed in the preamble) should operation of the legislation be stayed. A failure to consider that, in my view, would be reversible error.

[73] The chambers judge found there was a public interest in preventing the legislature from unilaterally altering contracts by legislation that, on its face, appears to infringe the *Charter*. While the law provides for the legislated amendment of collective agreements, that legislation must be *Charter* compliant. There are constraints on legislation that interferes with collective bargaining. This is a legitimate public interest and finds its expression, for example, in *BC Teachers' Federation*, *BC Health Services*, and *Mounted Police*.

[74] Concluding that something is in the public interest is not strictly a legal analysis, but is also informed by societal norms and the specific context and circumstances of each case. It involves the exercise of judicial discretion and is entitled to deference on appeal.

[75] The chambers judge considered the stated purposes of Bill 9 and the related public interest of the legislation. But he was also alive to competing interests that arise by virtue of the nature of the legislation and the nature of the alleged breach of s 2(d) in this case. I see no basis to interfere in the chambers judge's finding these to be legitimate public interests. Nor do I see

a reversible error in the finding that, in these circumstances, the balance of convenience favoured that interest.

Conclusion

[76] I would dismiss the appeal.

Appeal heard on August 29, 2019

Memorandum filed at Edmonton, Alberta
this 6th day of September, 2019

Authorized to sign for: Paperny J.A.

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